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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

ARCHIE WATKINS,

Defendant and Appellant.

B206166

(Los Angeles County
Super. Ct. No. SA064220)

APPEAL from a judgment of the Superior Court of the County of Los Angeles,
Cynthia Rayvis, Judge. Affirmed.

Kathleen M. Redmond, under appointment by the Court of Appeal, for Defendant
and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Senior Assistant
Attorney General, Kenneth C. Byrne, Supervising Deputy Attorney General, Blythe J.
Leszkay, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant Archie Watkins (defendant) appeals his second degree robbery conviction, contending that the prosecutor engaged in six instances of misconduct, three of which occurred in the presence of the jury and three of which occurred outside the presence of the jury. According to defendant, the instances of misconduct, whether viewed individually or collectively, violated his rights to due process under both the federal and California Constitutions.

As to the instances of misconduct in the presence of the jury, we hold that they did not prejudice defendant because in each instance, the trial court timely admonished the jury, thereby mitigating any possible prejudice that may have resulted from the challenged comments. Moreover, given the strength of the prosecution's case against defendant, including his videotaped confession, those three instances of misconduct did not infect the proceeding with unfairness, nor is it reasonably probable that an outcome more favorable to defendant would have resulted had the conduct not occurred. As to the comments made outside the presence of the jury, we hold that defendant has not shown that they had any prejudicial affect upon the jury's verdict. We therefore affirm the judgment.

FACTUAL BACKGROUND

A. Prosecution's Case

On Sunday morning, May 27, 2007, around 5:00 a.m., Robert Castillo¹ was driving home from a party he attended in downtown Los Angeles. Around the intersection of Hawthorne Boulevard and Imperial Highway, Castillo saw defendant walking. Castillo, who had good relationships with his African-American coworkers, noticed that defendant had a "friendly expression" and "thought maybe [defendant] was

¹ Castillo, originally from Mexico, had lived in Los Angeles for three years and was a driver for DHL.

one of his job colleagues.” Defendant waived at Castillo and “seemed to say hello.” Castillo pulled over and said “Hello, what’s up?” But then Castillo realized he did not know defendant.

Defendant approached Castillo’s car and asked for a ride because he was not feeling well, telling Castillo that he did not live far away. Castillo explained that he had been affiliated with the Boy Scouts for 20 years, and “one of the tenets of [that] organization is that one must help one’s fellow man.” Castillo told defendant, “Okay, that’s fine. If it’s not very far I can give you a lift.” Castillo unlocked the car door and defendant entered the car. Defendant told Castillo to turn right on Imperial Highway and that he lived about three blocks away.

After one or two blocks, defendant said, “This is fine, you can pull up right here.” Castillo told defendant to “[t]ake care.” Defendant moved to one side, as if he was about to tie his shoe, then pulled out a gun, and yelled at Castillo using “foul language.” Defendant yelled, “Shut up, son of a bitch. Give me your wallet. Fuck you. Shut up.” Defendant was pointing the gun at Castillo’s ribs. According to Castillo, “[e]verything happened so quickly. [He] was . . . in shock and [he] handed [his wallet] to [defendant].” Castillo asked defendant to leave his driver’s license, but defendant repeated “shut up. Fuck you. Give me your wallet.” Castillo was “very scared [and v]ery frightened.” Nothing like that had ever happened to him before.

Defendant grabbed Castillo’s wallet, including his driver’s license, told Castillo to “get lost,” slammed the car door, and left. Castillo tried to dial 911 on his cell phone, but was too nervous. He made a u-turn and “all of a sudden [he] saw an Airport Police car drive by.” The police car was travelling in the opposite direction so Castillo made a u-turn and increased speed to “catch up with [it].” Between Prairie Avenue and Hawthorne Boulevard, Castillo pulled up next to the police officer and yelled that he had been robbed. The police officer asked Castillo to show him the location of the robbery and followed Castillo to a location where Castillo saw defendant walking. Castillo yelled, “He’s the one,” pulled over, and the police car pulled in front of him. The police officer exited his vehicle, shouted at defendant to stop, and pointed his gun at defendant. The

police officer called for back-up and other officers arrived. Castillo cautioned the officers to be careful and advised them that defendant had a gun in his pant leg. The gun was grey or silvery and looked “something like” the gun shown to Castillo in court.

The same day as the robbery, the police returned Castillo’s driver’s license and credit card to him. The police showed Castillo his wallet, but kept it for evidence.

Contrary to testimony of defendant (*post*) Castillo testified that after defendant robbed Castillo and exited his car, Castillo did not exit the car or turn off the engine; Castillo did not run up to defendant or grab his leg; and Castillo did not speak to defendant about a motel across the street or show defendant the money he had in his wallet.

On May 27, 2007, at around 5:00 a.m., Los Angeles Airport Police Officer Eric Williams was in a black and white patrol vehicle in the vicinity of Imperial Highway and Prairie Avenue waiting at a red traffic signal. A red vehicle approached on Officer Williams’s left and the occupant, Castillo, was honking his horn. Castillo appeared frightened. He told Officer Williams he had just been robbed, that the robber had a gun, and that he could show Officer Williams the robber’s location. Officer Williams followed the red vehicle for approximately two and a half blocks. As they approached the 3600 block of Imperial Highway, Castillo stopped his vehicle and pointed east. Officer Williams looked in that direction and observed an African-American male wearing dark clothing walking westbound on Imperial Highway. Officer Williams identified defendant in court as the male he observed walking.

When Officer Williams looked in defendant’s direction, defendant appeared to be reaching into his waistband. Officer Williams took cover behind his vehicle, pointed his weapon at defendant, and ordered him to drop to the ground. When defendant complied, Officer Williams radioed the Inglewood Police Department for backup. Two unmarked cars responded to the scene, the officers exited their vehicles with their guns drawn, approached defendant, and took him into custody. The officers searched defendant and recovered a rusted silver handgun from his person. One of the Inglewood Police Officers recovered Castillo’s wallet and identification about two doors east of the site of the arrest.

On May 27, 2007, at around 5:00 a.m., Inglewood Police Officer Luis Jaramillo responded to the vicinity of Hawthorne Boulevard and Imperial Highway. He observed defendant lying face down, being held at gunpoint by a Los Angeles Airport Police Officer. Sergeant Neal Cochran of the Inglewood Police Department, who responded to the scene at the same time as Officer Jaramillo, handcuffed defendant as Office Jaramillo held defendant at gunpoint. As Sergeant Cochran searched defendant, a loaded gun fell to the ground from defendant's pant leg.

After Sergeant Cochran searched defendant, someone mentioned to Officer Jaramillo that the victim's wallet was just east of the site of the arrest. Officer Jaramillo responded to that location and found the victim's wallet. The contents of the wallet were scattered on the sidewalk and in the street. Officer Jaramillo determined that the wallet belonged to Castillo because certain of the contents had Castillo's name on them. Officer Jaramillo turned over the wallet and its contents to a Hawthorne Police Officer who was handling the investigation.²

On May 27, 2007, at approximately 5:00 a.m., Inglewood Police Department Sergeant Neal Cochran responded to the 3600 block of Imperial Highway based on an officer's call for assistance. He observed defendant face down on the sidewalk with his hands extended in a position to be handcuffed. Sergeant Cochran handcuffed defendant, searched him, and recovered a loaded revolver. He recovered the gun from defendant's right pant leg. He unloaded the weapon to make it safe, and waited for a Hawthorne Police Department unit to arrive.

On May 27, 2007, at approximately 5:00 a.m., Hawthorne Police Department Detective Raul Espinoza responded to the 3700 block of Imperial Highway to take a report, take custody of an arrestee, and transport him to the Hawthorne jail. When Detective Espinoza arrived, there were Inglewood police officers on scene, defendant was in the back of a police car, and the victim was also at the scene. Inglewood Police Officers handed over evidence bags to Officer Espinoza. Office Espinoza received a

² The crime occurred in the City of Hawthorne.

“silver rusted” .32 caliber revolver, six .32 caliber rounds, and a wallet with identification belonging to Castillo. Detective Espinoza transported defendant and the evidence to the station, booked defendant, and booked the evidence. During the drive to the jail, defendant stated, “Can I give the poor guy his money back? I have to do something.”

At the police station, Detective Espinoza searched defendant and recovered \$55.76 from his sweatshirt pocket and \$139 from his wallet. Based on Detective Espinoza’s experience and training, the gun recovered from defendant’s person was operative at the time police recovered it. Detective Espinoza returned Castillo’s personal belongings to him the same day.

Hawthorne Police Department Detective Larry Robinson was the officer assigned to investigate the robbery of Castillo. He interviewed defendant the day after his arrest. Prior to the interview, he advised defendant of his Miranda³ rights and defendant waived those rights. Detective Robinson videotaped the interview, but did not have any substantive conversation with defendant about the case prior to starting the videotape.

According to the transcript of the videotape introduced by the prosecution at trial,⁴ defendant told Detective Robinson that, “It was about 4:00, maybe 5:00 in the morning. . . . [Defendant] was originally [going] to the store to get something, but [Castillo] rolled up on the side of [defendant], and . . . just asked [defendant] for a ride, so [defendant] took it.” Defendant claimed he did not know where he was going when he entered the car. Defendant also claimed he did not know why he entered the car. Defendant explained that he “took [Castillo] around to a little spot, and then, like all kinds of recent things got to goin’ through [his] mind. Like, [his] lease [was] up on [his] apartment. [His] manager just gave [him] a notice that [said he had] to be out by the 31st, which [was the next day], and [he had not] . . . [they⁵ had not] had a chance to look for

³ *Miranda v. Arizona* (1966) 384 U.S. 436.

⁴ The prosecutor played the videotape of the interview for the jury.

⁵ They is a reference to defendant, his wife, and his daughter.

another apartment. [They did not] have any more money. [They did not] have any money to move at all.”

Defendant explained to Detective Robinson that he had a gun in his possession for self-protection and that his brother gave the gun to him. During the interview, defendant described the incident as follows: “[Defendant] asked [the victim] to turn the corner, and before [defendant] stepped out [*sic*] the car . . . [defendant] said ‘fuck it,’ and pulled out the gun, and told [Castillo] to give [defendant] his wallet, and [Castillo] gave it to [defendant], and [defendant] walked off.”

B. Defense Case

Defendant’s case was based on his testimony. On May 27, 2007, defendant, who made \$7.00 an hour working at FedEx, was being evicted from the apartment where he lived with his wife and four-year-old daughter. His financial situation was troubling and stressful, and he was unable to sleep that morning.

At around 4:00 a.m., he decided to walk to the gas station and purchase a cigar. The gas station was located at Imperial Highway and Hawthorne Boulevard. As defendant was walking towards the gas station, “a little red car pulled up behind [him] and pulled over to the side.” The driver, Castillo, rolled down his window and asked if defendant knew him. When defendant answered in the negative, Castillo looked at defendant and told defendant he had “a nice smile.” Castillo then asked defendant if he wanted a ride, but defendant again answered in the negative. Castillo was “looking at [defendant] kinda funny,” and asked if defendant “wanted to make some money.” Defendant interpreted the question to mean that Castillo “wanted sex.”

Defendant, who is not homosexual, was “desperate for money” and “was thinking about doing something for [Castillo] for the money.” Defendant entered the car and Castillo proceeded down Imperial Highway to Yukon Avenue. As they drove, Castillo asked defendant if he liked men, what he did for a living, and where he lived.

Castillo stopped the car near Imperial Highway and Yukon Avenue, across the street from some motels, and asked defendant if he wanted to go across the street to a

motel. Defendant began to think that he “didn’t want to do it, [he] couldn’t do it.” Castillo then reached over “grabbed [defendant’s] thigh” and “started to move his hand upward.” Defendant “jumped and opened the door and stepped out of the car and . . . started walking.” Castillo exited his car “and came around and had his wallet in his hand [as defendant] turned around.” Castillo was showing defendant Castillo’s money and saying, “I got money. I got money. I’ll pay you.” At that point, defendant pulled out a gun he carried for self-protection because he “didn’t want [Castillo] anywhere near [him] . . .”⁶ Defendant was frustrated because he could not “go through with it” and because of “a lot of things . . . [that were] going on.” Defendant told Castillo to “get the fuck away from [him] . . .” Castillo dropped his wallet, ran back to his car, and drove off.

Defendant picked up the wallet because he “needed the money.” He started walking back to his house, westbound on Imperial Highway towards Hawthorne Boulevard. Defendant “felt bad” and was ashamed that he had pulled out the gun and taken the wallet. He also felt ashamed and embarrassed about almost going to the motel.

As defendant was walking back, he saw Castillo driving toward him, followed by a police officer. Both cars stopped next to defendant and the officer exited his vehicle, drew his gun, and ordered defendant to get down on the ground. Defendant had the gun in his waistband, but when the officers handcuffed him, the gun fell down his pant leg. When the police arrested defendant, he was cooperative. While he was in the back of the patrol car, defendant told an officer that he was sorry and that he wanted to give the money back. He said that because he was ashamed and sorry for what he had done.

Defendant was taken to a jail cell at the Hawthorne Police Department where, about 24 hours after his arrest, he spoke to a detective. During the prior 24 hours, defendant had time to think about what had happened. He was concerned about his family finding out about the incident because he “didn’t want anybody to find out about the guy offering [him] money for sex and [that he was] actually thinking about doing it.”

⁶ When defendant pulled the gun on Castillo, he did not intend to take Castillo’s wallet. His intent was to “just get [Castillo] away from [him].”

The detective removed defendant from his cell and, as they walked to the interview room, defendant asked the detective what was being said about him because he did not want anyone to find out that he had considered having sex with a man for money. The detective told defendant that the police report stated that defendant “had gotten in a car with a man and he drove [defendant] down to Imperial and [they] stopped there. [Defendant] pulled out a gun, robbed [the man of] . . . his wallet and ran away.” The detective told defendant that if defendant told the truth “things would go a lot easier for [him].” When the detective said that, defendant thought he should tell the detective “what was on the report.” According to defendant, “that would be the truth. What’s on the report. To them.” Defendant believed it would benefit him if he confirmed what was in the report.

After defendant and the detective arrived at the interview room, they had the conversation that Detective Robinson videotaped and that was subsequently played for the jury. Defendant admitted committing the acts in the report during the interview because he did not want his family to find out that he had considered going to a motel with Castillo.

PROCEDURAL BACKGROUND

The Los Angeles County District Attorney charged defendant in an information with second degree robbery in violation of Penal Code section 211⁷—a felony. The District Attorney further alleged that defendant personally used a firearm in the commission of the robbery within the meaning of section 12022.53, subdivision (b).

A jury found defendant guilty of second degree robbery and found the firearm allegation true. The trial court sentenced defendant to the low term of two years, plus a consecutive 10 year term for the firearm enhancement pursuant to section 12022.53, subdivision (b), for an aggregate term of 12 years.

⁷ All further statutory references are to the Penal Code, unless otherwise noted.

DISCUSSION

A. Instances of Claimed Misconduct

1. First Comment Before the Jury

During her direct examination of Detective Espinoza, the prosecutor asked him what he did with the gun recovered from defendant. When the detective responded that he “ran the serial number,” defense counsel objected on relevance grounds. At a sidebar, the prosecutor argued that whether the gun was registered was relevant, but the trial court disagreed and sustained the objection, stating, “I don’t think it’s relevant at all. . . . I’m not going to allow that.”

Nevertheless, during cross-examination of defendant, the prosecutor asked appellant whether the gun was registered. Defense counsel objected, the trial court sustained the objection, and instructed defendant not to answer. Defense counsel then requested an admonition, which the trial court gave, stating, “The jury is to be admonished that the question by the district attorney is not evidence and you’re not to consider it.”

The next day, defense counsel requested a mistrial or, in the alternative, an instruction under *People v. Bolton* (1979) 23 Cal.3d 208.⁸ The trial court denied the

⁸ In *People v. Bolton*, *supra*, 23 Cal.3d 208, the court explained that when a prosecutor engages in misconduct in the presence of the jury and “defense counsel requests cautionary instructions, the trial judge certainly must give them if he agrees misconduct has occurred. [The trial court] should aim to make a statement to the jury that will counteract fully whatever prejudice to the defendant resulted from the prosecutor’s remarks. In the present case, such a counterbalancing statement might have taken the following form: ‘Ladies and Gentlemen of the jury, the prosecutor has just made certain uncalled for insinuations about the defendant. I want you to know that the prosecutor has absolutely no evidence to present to you to back up these insinuations. The prosecutor’s improper remarks amount to an attempt to prejudice you against the defendant. Were you to believe these unwarranted insinuations, and convict the defendant on the basis of them, I would have to declare a mistrial. Therefore, you must disregard these improper, unsupported remarks.’” (*Id.* at pp. 215-216, fn. 5.)

motion and the requested instruction, stating “[The Court]: All right. The question should not have been asked. I did admonish the jury at the time on your request and I would have done it anyway. They were told not to consider that. [¶] This is not the main area of what’s going on here. It’s not an issue that the jury needs to dwell on or discuss. There would be no reason for them to discuss it. I don’t think that based upon what I heard that there would be any prejudice to your client. They were admonished at the time. Bringing it up at this time would only serve to highlight the issue, which is— which happened yesterday. [¶] It didn’t rise to the level of the court granting a mistrial. The court is going to deny the motion for a mistrial as well as the instruction. I don’t think that this warrants it. [¶] I am surprised that [the prosecutor] asked the question based on the court’s ruling, but I think it was cured at the time.”

2. Second Comment Before Jury

During closing argument, the prosecutor stated, “You know, the fact that—you may be wondering, it’s such an obvious case, what you’re all doing here. But the defendant does have a constitutional right to a jury trial. That’s exactly what he’s doing. The defense had to come up with something to present to you at this trial.”

Defense counsel objected, stating, “That’s inappropriate conduct to allege against the defense.” The trial court sustained the objection and admonished the jury, stating, “I’m going to sustain the objection—I will sustain the objection and ask the jury to disregard the last statement by the prosecution.”

3. Third Comment Before Jury

During rebuttal argument, the prosecutor stated: “We know in time for jury trial the defendant changed his story. He’s had six months to come up with the brandishing plus petty theft tale. After he talked to his lawyer and he figured out what the elements of robbery are.”

Defense counsel again objected, and the following colloquy took place: “[Defense Counsel]: Once again, objection, Your Honor. That’s inappropriate. [¶] [The Court]:

Sustained. [¶] [Defense Counsel]: May the jury please be admonished, Your Honor. [¶] [The Court]: Sustained. I'll ask the jury to disregard the last sentence by the prosecutor. [¶] [Prosecutor]: Once the defendant figured out-- [¶] [Defense Counsel]: Can I have a moment, please? I'm asking for an admonishment, a more severe admonishment. I ask for a severe admonishment. [¶] [The Court]: I will admonish the jury anything said between the attorney and his client is information that is purely privileged and not to be discussed, nor does the prosecution know anything about that. So that's why I sustained the objection. Go ahead. [¶] [Defense Counsel]: I have a motion to make, Your Honor. [¶] [The Court]: All right. Please approach. [The following proceedings were held outside the presence of the jury] [¶] [Defense Counsel]: I'm asking the court to declare a mistrial due to prosecution misconduct. This is now the second time she's made accusations against defense counsel. The second time. [¶] [The Court]: That's correct. [¶] [Defense Counsel]: So number one, I'm asking for a mistrial. I'm asking for court to declare a mistrial. If the court is not going to declare a mistrial, then I'm asking for a strong curative instruction. [¶] . . . [¶] [The Court]: The motion for mistrial is denied for the following reason. Each time the jury was admonished. And I will admonish the jury again, . . . [¶] [To the jury] Ladies and gentlemen, any improper actions attributed to the defense attorney by the prosecutor were improper. The court has found that throughout this trial [defense counsel] has acted appropriately at all times."

4. First Colloquy Outside Presence of the Jury

The prosecution played a videotape of defendant's interview with Detective Robinson and the jury was given a transcript of the videotape prepared by the prosecution. Because defense counsel contended that the prosecution's transcript of the videotape was inaccurate in certain respects, defense counsel prepared his own videotape and corresponding transcript. In discussing the transcript of defense counsel's videotape, the following colloquy occurred:

"[Prosecutor]: And I would state that [defense counsel's transcript] is willfully false in several places. It says things that are incorrect, blatantly wrong. [¶] [Defense

Counsel]: Well, I would disagree with that. [¶] [The Court]: I'm sure you would. I'm really tired of the two of you bickering the way you are. I think we need to act more civilly here. What are you claiming is willfully false? [¶] [Prosecutor]: Your Honor, did [defense counsel] provide you with a copy of his transcript? [¶] [The Court]: No. I have the original transcript. [¶] [Prosecutor]: Well, it's my transcript that's correct. It's his that is willfully false. [¶] [The Court]: When you're saying willfully false, you're accusing [defense counsel] of purposely making a false document. [¶] [Prosecutor]: That's correct. [¶] [The Court]: As opposing to hearing it differently. [¶] [Defense Counsel]: We disagreed on several sentences as it was being interpreted. [¶] [Prosecutor]: I don't think it was hard to hear what was being said. [¶] [The Court]: So you disagree with that. All right. I think people may hear things differently. All the times [defense counsel] has appeared in my courtroom, I've never found him to be willfully false on anything. And I would be hard pressed to believe he would do that. [¶] [Prosecutor]: If the court would like to hear the tape and compare it to the transcript, you might change your mind.

5. *Second Colloquy Outside Presence of the Jury*

After playing a videotape of Detective Robinson's interview prepared by the defense, defense counsel told the jurors: "You can listen during your deliberations as much as you need to. If you'd like to hear what was actually said as opposed to what was attributed to him."

The following colloquy occurred outside the presence of the jury: "[¶] [Prosecutor]: I'd ask that [defense counsel] use People's 4 [the prosecution's videotape] to play this part because I haven't heard his compilation. [¶] [Defense Counsel]: This is the tape that we talked about. This is the tape I made at the beginning. [¶] [Prosecutor]: Right. [¶] [Defense Counsel]: It's not even before it's—it goes to the guy's part. [¶] [The Court]: Are you going to play it to the end? [¶] [Defense Counsel]: You know, where there's a transition. I wasn't even going to play the transition. I was going to stop it well before the transition. [¶] [Prosecutor]: I really hate to say this, but I thought I just

heard that the tape had been altered, the one that [defense counsel] just played. I thought it said the guy took me around to a little spot. [¶] [The Court]: You're saying that the voice has been altered? [¶] [Prosecutor]: Yes. [¶] [The Court]: That's quite an accusation. [¶] [Prosecutor]: That's why I hated to say it, but I would really like to use the original."

6. *Third Colloquy Outside Presence of the Jury*

After defense counsel objected to the prosecutor's third comment to the jury in closing argument, the following exchange occurred outside the presence of the jurors: "[¶] [Defense Counsel]: But I also think what you have to do when some sort of accusation is made like that, you have to have a strong curative instruction or else it's just going to go by the—and I think the strong curative instruction is that [defense counsel] acted appropriately and properly and has always done so in this trial, and to have any insinuation to the contrary is improper. [¶] [The Court]: Okay. What I can say is that improper argument was made by the prosecutor attributing certain actions to [defense counsel], the defendant's attorney. The court has found that [defense counsel] has not acted improperly in any way during this trial. [¶] [Prosecutor]: Well, that's inappropriate. [¶] [The Court]: It's not inappropriate at all. [¶] [Prosecutor]: Considering [defense counsel] has done several inappropriate things. Talking about the defendant's lack of convictions, given the fact that the court had already ruled on the fact that that was not coming in. The court has already given the jury a curative instruction saying that argument was improper."

B. Legal Principles

Defendant challenges the six instances of claimed prosecutorial misconduct under both the California and federal Constitutions. "Under California law, a prosecutor commits reversible misconduct if he or she makes use of 'deceptive or reprehensible methods' when attempting to persuade either the trial court or the jury, and it is reasonably probable that without such misconduct, an outcome more favorable to the

defendant would have resulted. (*People v. Strickland* (1974) 11 Cal.3d 946, 955 [114 Cal.Rptr. 632, 523 P.2d 672].) Under the federal Constitution, conduct by a prosecutor that does not result in the denial of the defendant’s specific constitutional rights—such as a comment upon the defendant’s invocation of the right to remain silent—but is otherwise worthy of condemnation, is not a constitutional violation unless the challenged action “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” (*Darden v. Wainwright* (1986) 477 U.S. 168, 181 [91 L.Ed.2d 144, 106 S.Ct. 2464] (*Wainwright*), quoting *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643 [40 L.Ed.2d 431, 94 S.Ct. 1868].)” (*People v. Riggs* (2008) 44 Cal.4th 248, 298.) “In either case, only misconduct that prejudices a defendant requires reversal (*People v. Fields* (1983) 35 Cal.3d 329, 363 [197 Cal.Rptr. 803, 673 P.2d 680]), and a timely admonition from the court generally cures any harm. (See *People v. Gallego* (1990) 52 Cal.3d 115, 200 [276 Cal.Rptr. 679, 802 P.2d 169].)” (*People v. Pigage* (2003) 112 Cal.App.4th 1359, 1375.)

C. Comments Before the Jury

Assuming, arguendo, that each of the three comments by the prosecutor in the presence of the jury rose to the level of misconduct, the trial court made timely admonitions as to each. Thus, there is no “reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.” (*People v. Smithey* (1999) 20 Cal.4th 936, 960, quoting *People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

For example, although the prosecutor asked defendant whether the gun recovered from his person was registered—after the trial court had previously found that issue irrelevant—defense counsel objected and defendant never answered the question. Moreover, the trial court immediately advised the jury that the prosecutor’s question was

not evidence and to disregard it.⁹ And, as the trial court pointed out, the registration issue was collateral because, inter alia, defendant admitted at trial to having the gun in his possession and pointing it at Castillo. In light of those admissions, whether the gun was registered was irrelevant to the core issue in dispute: whether defendant used the gun to rob Castillo, as the prosecution contended, or whether he merely brandished it to ward off Castillo's advances, as defendant contended. Thus, it is not reasonably likely that the jury considered the question in resolving that core issue, much less construed it or applied it in an objectionable fashion.

But even if the jury disregarded the admonition and considered the gun registration question, that single question did not infect the entire proceeding with unfairness such that the conviction violated due process; nor did the question make it reasonably probable that defendant would have obtained a more favorable outcome. Defendant admitted on videotape that he robbed Castillo at gun point and his admission was largely consistent with Castillo's version of the robbery. Moreover, at trial, defendant admitted that he was carrying the gun on the morning in question, albeit for self-defense, and that he pointed it at Castillo, albeit to keep Castillo at bay. Those admissions and the corroborating testimony from Castillo were strong evidence of guilt, such that it is highly unlikely that defendant would not have been convicted of robbery without the reference to the registration of the gun.

Defendant contends that Castillo's testimony about why he picked up defendant is inherently incredible. Although Castillo's mistaken identity and "Boy Scout" explanation for picking up defendant—a stranger, at 5:00 a.m. in the morning—may have been difficult for a reasonable juror to accept, the purported implausibility of that explanation is beside the point. The jury easily could have disregarded that testimony—on the logical assumption that neither Castillo nor defendant wanted to admit to solicitation—accepted defendant's version involving solicitation instead, and

⁹ Presumably, the prejudice to defendant from the question is that it implied the gun was not registered and, therefore, that defendant, who admitted to carrying the gun, was something other than the law-abiding family man his testimony portrayed.

nevertheless accepted the balance of Castillo's testimony. Based on defendant's confession to robbery, the jury could have concluded that, regardless of why Castillo picked up defendant, it was evident that defendant took advantage of the situation and robbed Castillo. Given the strength of the prosecution's case on the elements of second degree robbery, the gun registration question did not prejudice defendant.

A similar analysis applies to the prosecutor's two comments to the jury during closing and rebuttal argument. Even assuming those comments were misconduct, the trial court timely admonished the jury. As to the first of those two comments, which implied that *the defense* had contrived defendant's version of the incident, the trial court immediately admonished the jury to disregard it. As to the second comment during rebuttal, which suggested that *defense counsel* had assisted in developing the "brandishing plus petty theft tale," the trial court not only admonished the jury that the comment about defense counsel was improper, it went further and informed the jury that defense counsel had "acted appropriately at all times" during the trial. Thus, the admonitions delivered to the jury during the prosecutor's argument removed any reasonable likelihood that the jury construed or applied those remarks in an objectionable fashion.

Even if the admonitions did not prevent the jury from considering the improper comments during argument, they did not infect the proceeding with unfairness, and it was not reasonably probable that defendant would have received a more favorable outcome if the comments had not been made. As discussed above in connection with the improper gun registration question, the prosecution's case was strong, particularly in light of defendant's post-arrest confession and admissions at trial. Given the evidentiary record, it is not probable that the jury would have accepted defendant's brandishing explanation as to how Castillo's wallet admittedly came into defendant's possession, if only the prosecutor had not impugned defense counsel. Defendant voluntarily confessed to armed robbery the day after the incident, a fact which, when combined with the other evidence, shows that the improper comments during argument were not prejudicial. (See *People v. McCracken* (1952) 39 Cal.2d 336, 349 [prosecutor's suggestion that defense counsel

contrived the defendant's defense "highly improper," but judgment affirmed based on timely objection and admonition, and strong evidence of guilt].)

D. Colloquies Outside Presence of the Jury

Defendant contends that the three instances of claimed misconduct that occurred outside the presence of the jury evidenced the prosecutor's "attitude" toward defense counsel and "infected the entire proceeding," such that reversal is warranted. According to defendant, those colloquies show the "prosecutor's disdain for defense counsel," and that disdain must have influenced the jury to believe that the prosecutor's interpretation of the evidence was the correct one.

It is undisputed that the instances of claimed misconduct occurred outside the presence of the jury, and there is nothing in the record to suggest that the jury overheard or was otherwise influenced by that conduct. Absent some reliable indicator that the jury's verdict or the trial judge was influenced by the conduct in issue, defendant has failed to show how that conduct could have affected the outcome. (See *People v. Williams* (2009) 170 Cal.App.4th 587, 630; *People v. Pigage*, *supra*, 112 Cal.App.4th at p. 1375.) On this record, there is no indication that defendant was prejudiced by the three instances of claimed misconduct that occurred outside the presence of the jury.

E. Cumulative Error

Defendant contends that, even if the individual instances of misconduct, viewed in isolation, do not warrant reversal, when they are viewed in the aggregate they rise to the level of reversible error. We disagree.

As discussed above, there is no indication that the three instances of claimed misconduct that occurred outside the presence of the jury had any effect on the outcome. Thus, they cannot be considered in evaluating the cumulative effect of the claimed misconduct. And, the prejudicial effect of each of the three remaining instances of misconduct was mitigated by timely admonitions and the strength of the evidence of guilt. Thus, even when viewed collectively, those three minimally prejudicial instances

of misconduct do not warrant reversal. (See *People v. Hinton* (2006) 37 Cal.4th 839, 872.)

DISPOSITION

The sentence and judgment of conviction are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MOSK, J.

We concur:

TURNER, P. J.

KRIEGLER, J.